U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 04 2009
SRC 07 800 26506

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. Group Health Plan, Inc. (Group Health), Bloomington, Minnesota, seeks to employ the beneficiary as a gastroenterologist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States because the beneficiary seeks to practice medicine in a medically underserved area. The director found that a key document was not executed during the period required by regulation.

On appeal, the petitioner argues: "The basis for denial is a minor technicality."

Part 1 of the Form I-140 petition identifies Group Health as the petitioner, and Form G-28, Notice of Entry of Appearance as Attorney or Representative, identifies [redacted] of Faegre & Benson LLP as the petitioner's attorney of record. Review of the petition form, however, indicates that [redacted] is the petitioner. An applicant or petitioner must sign his or her application or petition. 8 C.F.R. § 103.2(a)(2). In this instance, Part 8 of the Form I-140, "Signature," bears [redacted] name, telephone number and electronic mail address. Thus, [redacted], and not Group Health, has taken responsibility for the content of the petition. This will not affect the adjudication of the appeal, because the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(k)(1) indicates that any person may file a petition on behalf of an alien seeking a national interest waiver, and because [redacted] also filed the appeal.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

> (ii)(I) The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if—
>
> > (aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and
> >
> > (bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

The sole issue in contention concerns one of the documentary requirements set forth in USCIS regulations. Under 8 C.F.R. § 103.2(a)(7), the date that the service center receives a petition is the petition's filing date. The petitioner electronically filed the Form I-140 petition on July 30, 2007. Therefore, the petitioner must establish that the petition was approvable as of July 30, 2007. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. 8 C.F.R. § 103.2(b)(1). *See also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998). The regulations and case law are clear that a petitioner may not prematurely file an employment-based immigrant petition, on the expectation that the beneficiary will later become eligible or that required evidence will later come into existence.

8 C.F.R. § 204.12(c)(3) requires the petitioner to submit a letter (issued and dated within 6 months prior to the date on which the petition is filed) from a Federal agency or from the department of public health (or equivalent) of a State or territory of the United States or the District of Columbia, attesting that the alien physician's work is or will be in the public interest. The petitioner submitted a letter from an official of the Minnesota Department of Health (MDH), dated July 31, 2007, asserting that the beneficiary's "work . . . [is] and will continue to be in the public interest."

The director denied the petition on December 15, 2008, stating that the MCH letter is dated after the July 30, 2007 filing date, and therefore does not meet the requirement "that the letter must be dated during the six-month period *preceding* the filing of the petition" (director's emphasis).

On appeal, the petitioner states: "The basis for denial is a minor technicality with no relevance to [the beneficiary's] eligibility for a national interest waiver." The beneficiary's eligibility for the waiver is only one factor that USCIS must consider when adjudicating a petition. 8 C.F.R. § 103.2(a)(1) states that a petition cannot be approved unless it is properly filed in accordance with the relevant instructions.

The reference to "a minor technicality" necessarily implies that there are also "major technicalities" that USCIS cannot overlook. The petitioner cites no statute, regulation, or case law that would permit a meaningful, objective distinction between a "minor technicality" and a "major technicality." The petitioner argues, in effect, that the petitioner need not meet all of the regulatory requirements, so long as the petitioner has met most of them. Such an argument begs the question of how many omissions USCIS must overlook before denial is warranted. There can, therefore, be no allowance for "minor technicalities"; if a petition does not conform to all applicable requirements, then USCIS has no discretion to approve the petition. An agency is bound by its own regulations. *See, e.g., Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission*, 6 13 F.2d 1 120 (C.A.D.C., 1979).

In a similar vein to the above argument, the petitioner contends: "The denial is based on an excessively technical interpretation of a regulation." The plain wording of the regulation requires the letter to have been issued "within 6 months prior to the date on which the petition is filed." The petitioner fails to provide a less "technical interpretation" by which a date after the filing date is, nevertheless, "prior to the [filing] date."

Also with respect to interpretation, the petitioner states: "the decision's interpretation of 8 C.F.R. § 204.12(c)(3) is contrary to Congressional intent." Section 203(b)(2)(B)(ii)(I)(bb) of the Act requires the petitioner to show that "a Federal agency or a department of public health in any State has *previously* determined that the alien physician's work in such an area or at such facility was in the public interest" (emphasis added). Where the language of a statute is clear on its face, there is no need to inquire into Congressional intent. *INS v. Phinpathya*, 464 U.S. 183 (1984).

The petitioner acknowledges the statutory language quoted above, but asserts that MDH "did 'previously determine that [the beneficiary's] work was in the public interest in 2005, in its letter supporting his J-1 waiver application. The six month period provided in the regulations is an additional obligation not supported by the statute."

Section 103(a) of the Immigration and Nationality Act requires the Attorney General to establish such regulations as he deems necessary for carrying out his authority under the provisions of that Act. The Attorney General has delegated certain rule making authority to the Commissioner of Immigration and Naturalization. 8 C.F.R. § 100.6. The regulations at 8 C.F.R. § 204.12 were issued under the authority of the Attorney General and the Commissioner of the Immigration and Naturalization Service, who had authority over immigration matters prior to the creation of USCIS within the Department of Homeland Security on March 1, 2003.

Congress is presumed to be aware of existing administrative and judicial interpretations of statutes. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978). The regulatory six-month period has existed for nearly a decade, with no Congressional action to modify or remove that requirement. By necessity and by design, regulations contain details that are not found in the underlying statute. The existence of these details does not nullify the regulations.

The petitioner argues: "The regulation . . . did not contemplate the electronic filing procedure where the supporting documentation is submitted by mail during the following seven business days." The petitioner fails to explain why electronic filing alters the meaning or intent of the regulation. The seven-day submission period that follows the electronic filing date is simply to accommodate the mailing of documentary evidence that, by nature, cannot be submitted electronically; it is not an additional opportunity for the petitioner to solicit or create evidence that did not exist on the filing date.

The petitioner argues "the decision to deny this petition is against the interests of USCIS, the State of Minnesota, the community of St. Paul, and HealthPartners." The petitioner also asserts that re-filing the petition would be "an inefficient waste of time and resources." These issues are distractions that offer no resolution of the issue at hand. The director is not required, or even permitted, to approve a petition that is improperly filed or that lacks acceptable required evidence. The petitioner erred by filing a petition before required documentation existed. The petitioner's stated aversion to re-filing the petition does not justify the reversal of a procedurally proper denial. *See Reuters Ltd. v. F.C.C.*, 781 F.2d 946, (C.A.D.C., 1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned).

Review of the record indicates a second issue of concern. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

If the physician will be an employee (rather than start his or her own practice), the USCIS regulation at 8 C.F.R. § 204.12(c)(1)(i) requires the petitioner to submit a full-time employment contract for the required period of clinical medical practice. The contract must have been issued and dated within 6 months prior to the date the petition is filed. The beneficiary's original contract with Group Health is dated September 25, 2004, nearly three years prior to the filing date, and is therefore too old to qualify under the regulations. An "Amendment to Physician Service Agreement" is dated July 31, 2007, the day after the petition's filing date. Therefore, the contract, like the MDH letter, falls outside the regulatory period.

The petitioner, by filing the petition before obtaining required evidence, failed to follow procedures mandated by both statute and regulation. The petition therefore cannot be approved. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. The AAO must therefore dismiss the appeal.

This decision is without prejudice to the filing of a new petition that conforms to all relevant statutory and regulatory requirements, accompanied by appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.